BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LESTER R. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,000,975
EXIDE CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the November 9, 2004, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on April 26, 2005.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Dustin J. Denning of Salina, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument to the Board, the parties stipulated the stay entered in respondent's bankruptcy proceeding had been lifted. They also agreed to the 7.5 percent functional impairment rating determined by the Judge and agreed that claimant's last day of working for respondent was August 20, 2002, as indicated in the exhibits attached to Todd Petersen's deposition.

ISSUES

There is no dispute that claimant injured his upper extremities working in respondent's Salina, Kansas, battery plant and that October 18, 2001, is the appropriate date of accident for this claim.

In the November 9, 2004, Award, Judge Moore determined claimant sustained a 7.5 percent whole person functional impairment due to his bilateral upper extremity injuries. The Judge granted claimant permanent disability benefits under K.S.A. 44-510e based upon that functional impairment. In analyzing claimant's permanent disability, the Judge found claimant failed to make a good faith effort to retain his employment with respondent

as he was fired for being insubordinate. Accordingly, the Judge determined claimant would have continued to earn wages that were comparable to his pre-accident wages had he not been terminated.

Claimant contends Judge Moore erred. Claimant argues he was justified in refusing to return to the same type of work that caused his injuries. Accordingly, claimant contends he has sustained a 65 percent task loss, a 51 percent wage loss, and a 58 percent work disability (a permanent partial general disability greater than the whole person functional impairment rating).

Conversely, respondent contends the Award should be affirmed. In the alternative, the company argues claimant has a 14.8 percent task loss and a wage loss based upon a post-injury wage of $320 per week through June 30, 2003, followed by a post-injury wage of $394.80 per week.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the November 9, 2004, Award should be affirmed.

Claimant sustained bilateral upper extremity injuries working in respondent's Salina, Kansas, battery plant. The parties stipulated October 18, 2001, was the appropriate date of accident for determining claimant's workers compensation benefits for this repetitive trauma injury.

Beginning February 2002, claimant began receiving medical treatment from Dr. J. Mark Melhorn, who is a board-certified orthopedic surgeon. The doctor injected both of claimant's wrists twice each and prescribed physical therapy. A normal nerve conduction study failed to demonstrate carpal tunnel syndrome. In May 2002, the doctor released claimant to return to work without restrictions. But Dr. Melhorn later advised, if claimant's symptoms continued, claimant could work with task rotation, lifting restrictions (50 pounds maximum and 25 pounds frequently), and repetitive pushing, pulling, and grasping limited to six hours or less per eight hours.

In May 2002, claimant saw Dr. Frederick R. Smith, who is a specialist in physical medicine and rehabilitation, for a second time at claimant's attorney's request. Dr. Smith diagnosed claimant as having overuse syndrome with tendinitis in both wrists and degenerative changes in his left thumb and left elbow. The doctor recommended that claimant "punch cases" (the job claimant was performing while undergoing medical

treatment) only two hours at a time with a maximum of four hours during a 10-hour shift, limit lifting to a five-pound maximum for each upper extremity, and perform no forceful, repetitive gripping with either hand.

In August 2002, respondent assigned claimant a job that claimant believed would violate his medical restrictions. On August 20, 2002, claimant refused to perform the job and, more importantly, refused to leave the plant when requested by his supervisors. The testimony from respondent's human resources manager, Todd Petersen, summarized the situation:

> Q. (Mr. Denning) And tell me what you said to Mr. Smith and what he said to you [before he was escorted from the plant] during that telephone conversation?
>
> A. (Mr. Petersen) I said, Lester, I understand you are being insubordinate to your supervisor and superintendent, you know, what's going on? He told me that he was going to punch cases, that was his job. I said, no, that's not the job, that's part of the job, and your doctor's released you to do more of the job, and we ask that you try. And he remained argumentative. I said, if you can't do it, then you can go home. You can come back in the morning, we'll talk to the nursing staff, talk to the doctor about modifying the restrictions, but we ask that you try. He then told me, I'm going back down to my line to punch cases, and threw the phone on the desk.[1]

When claimant refused to leave the plant when asked, respondent called law enforcement officers, who escorted claimant out of the plant. Consequently, respondent later officially terminated claimant.

Claimant sustained simultaneous injuries to both upper extremities. Accordingly, K.S.A. 44-510e governs how claimant's permanent disability is determined. That statute provides, in pertinent part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of

[1] Petersen Depo. at 11.

> functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the worker's post-injury wage should be based upon the ability to earn wages rather than actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The Board concludes claimant failed to make a good faith effort to retain his employment with respondent. Instead, claimant's refusal to leave the plant when requested forced respondent to terminate him.

The Board finds no compelling reason to disturb the Judge's finding that claimant would have continued to earn wages comparable to his pre-accident wages had he not been terminated. That finding is based upon Mr. Petersen's testimony that claimant would presently be working for respondent within his medical restrictions if he had not been insubordinate.[5]

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

[5] Petersen Depo. at 15-16.

Accordingly, for purposes of the wage loss prong of the permanent partial general disability formula, a post-injury wage should be imputed to claimant that is within 10 percent of his pre-accident wage. Consequently, claimant's permanent partial general disability under K.S.A. 44-510e is limited to his 7.5 percent whole person functional impairment rating, as found by the Judge.

The Board adopts the findings and conclusions set forth in the November 9, 2004, Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the November 9, 2004, Award entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Dustin J. Denning, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director